



**Muna v Wambugu & 4 others (Petition E058 of 2022)
[2023] KEELRC 1244 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1244 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E058 OF 2022**

B ONGAYA, J

MAY 25, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA

**ARTICLES 10, 19(2), 20 (1) (2) (3) & (4), 21 (1) &
(3), 22 (2) (C), 23(3), 24, 27, 28, 35, 41, 47, 73(2)
(B), (C) (I) & (D) & (D), 156 (6), 159 (2) (C), 160, 201
(A), (B) &(D), AND 258**

**IN THE MATTER OF THE SPORTS ACT (ACT NO. 25
OF 2013)**

**IN THE MATTER OF THE PUBLIC FINANCE
MANAGEMENT ACT**

**IN THE MATTER OF THE PUBLIC FINANCE
MANAGEMENT (SPORTS, ARTS & SOCIAL
DEVELOPMENT FUND) REGULATIONS, 2018 (L/N**

194 OF 2018)

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**IN THE MATTER OF THE STATUTORY INSTRUMENTS
ACT**

BETWEEN

NICHOLAS KARIMI MUNA PETITIONER

AND

JOHN MARK WAMBUGU 1ST RESPONDENT



**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF SPORTS
DEVELOPMENT 2ND RESPONDENT**

**CABINET SECRETARY, NATIONAL TREASURY & PLANNING 3RD
RESPONDENT**

**THE SPORTS, ARTS AND SOCIAL DEVELOPMENT FUND OVERSIGHT
BOARD 4TH RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petitioner is Nicholas Karimi Muna. He filed the petition on dated April 6, 2022 through Guandaru Thuita & Company Advocates. He prayed for orders as follows:
 - a. Declaration that the 1st respondent herein has served the statutory maximum six months allowed in law as acting Chief Executive Officer in the secretariat of the Fund and is not eligible for further reappointment.
 - b. A declaration that the 1st respondent should immediately cease acting as Chief Executive Officer to pave way for a transparent, open participatory recruitment of a new Chief Executive Officer in the secretariat of the Fund and a caretaker to be appointed to oversee the transition.
 - c. A declaration to issue that the respondents have failed in their administrative duties as regards competitive appointment of a new Chief Executive Officer in the secretariat of the Fund.
 - d. A mandatory order to issue to compel the 2nd to 4th respondents to commence the process of recruiting and appointing the new Chief Executive Officer in the secretariat of the Fund competitively according to law.
 - e. In the alternative, pending the substantive appointment of the secretariat of Sports Fund there be appointed an acting Chief Executive Officer in the secretariat of the Fund who has not acted as such for at least 6 months as in line with section 34 of the *Public Service Commission Act*, Laws of Kenya.
 - f. The costs of and incidental to, this petition be awarded to the petitioner against the respondents.
 - g. The Honourable Court be pleased to grant such further order or orders as may be just and appropriate.
2. The petitioner has pleaded that he is a citizen of Kenya and an ardent fan of sports and sporting activities with an inclination to football, volleyball, chess, darts and pool he invokes Articles 22, 23, and 258 of the *Constitution* of Kenya. The petition was based on the supporting affidavit by the petitioner. The petitioner further pleads as follows:
 - a. The Sports, Art and National Development Fund was initially established as the National Sports Fund under the *sports Act*, 2013 per section 12 of Part III of the Act. On April 3, 2019 the National Assembly passed the Sports (Amendment) Bill 2018 repealing Part III in its entirety and replaced the National Sports Fund with the Sports, Art and National Development Fund.



- a. Section 8 of in Part III of the Finance Management (Sports, Arts and Social Development Fund) Regulations lays out the structure of management of the Fund which is through the Sports, Art and National Development Fund Oversight Board. The Board manages the National Sports Fund established under regulation 8 Finance Management (Sports, Arts and Social Development Fund) Regulations. Section 11 of the regulations provides for secretariat of the Fund comprising the Chief Executive Officer and such other staff necessary for the proper discharge of functions of the Board. Under regulation 12 (2) the Chief Executive Officer is recruited competitively in consultation with the Public Service Commission. The Regulations do not provide for acting appointments.
 - b. Section 2 of the [Public Service Commission](#) defines acting appointment as a temporary conferment upon a public officer, by the Commission or the relevant appointing authority, the power to perform duties of a public officer other than the office that the officer is appointed to hold, while the public officer continues to hold the substantive appointment. Further section 34 (3) of the [Act](#) provides that an officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.
 - c. The current acting Chief Executive Officer of the Fund being the 1st respondent has been serving in acting capacity under the administrator of the Fund for a period of over six months and having been first appointed on March 23, 2017. having served for an initial 6 months, the 1st respondent should be barred from continuing to so act and extension of his acting tenure vacate office of Chief Executive officer of the fund.
 - d. Regulation B 4(1) of Public Service Commission Code of Regulations (Human Resources Policies and Procedure Manual for the public service provides that Ministries and State Departments should advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least 21 days before closing.
 - e. The 1st respondent has been acting for over 6 months which amounts to violation of law and therefore a gross violation of rule of law provided for in Article 10(2) of the [Constitution](#) as well as violation of good governance, integrity, transparency and accountability per Article 10(2) of the [Constitution](#).
3. The 2nd to 5th respondents appointed learned Chief State Counsel Oscar Eredi for Attorney General to act in the matter. They filed the replying affidavit of Joe Okudo, the Principal Secretary in the State Department for Sports. The respondents urged and pleaded as follows:
- a. Following the Sports (Amendment) Act No 7 of 2019 the transitional provisions provided the employees of the National Sports Fund Board of Trustees shall serve in the Sports, Art and National Development Fund.
 - b. There were circulars No OP/SCAC 9/21/1/1 dated May 15, 2017, OP/CAB. 39/4A of July 28, 2017 and OP/CAB/ 1A dated February 7, 2022 barred Government institutions from making new recruitment unless Human Resource Structures were in place. Later the COVID 19 pandemic was declared slowing down the recruitment process. It is true the 4th respondent resolved to appoint staff on acting capacity beyond 6 months. The 4th respondent suffered delays in issuing the relevant Human Resource Policies and therefore the acting appointments.



- c. The 4th respondent advertised the Chief Executive Officer's vacancy for competitive filling but the same was challenged in *Okinda Omodi Versus CS Ministry of Sports, culture and Heritage & 2 others* ELRC Petition No E25 of 2022.
 - d. The position of CEO was subsequently advertised on June 6, 2022. The Court is urged to find that the petition has been overtaken.
 - e. The Court to find that the appointment of the acting Chief Executive officer was in accordance with the *Public Service Commission Act*, 2017. The acting Chief Executive Officer was appointed on April 1, 2022 and continues to work as appointed.
4. Final submissions were filed for the petitioner and the 2nd to 5th respondents. The Court has considered all the material on record and returns as follows:
- a. The undisputed evidence on record is that the 1st respondent has been acting for a long time as Chief Executive officer of the Fund contrary to provisions of the *Public Service Commission Act*, 2017 requiring acting appointments to be for at least 30 days and at most 6 months. The petitioner has established that the respondents have indeed violated the cited values and principles of national governance in Article 10(2) of the *Constitution*. The petition should succeed upon that finding.
 - b. While the cited circulars froze employment upon stated grounds there was a window for a waiver upon request but which the respondents appear to have failed to utilise. The respondents have not given any reason why they failed to promptly or within reasonable time to develop and issue relevant human resource instruments to pave way for the recruitment. It also appears to the Court that the position of CEO was not a new position as it was already funded and in existence so that recruiting a substantive holder would not amount to a new recruitment of an employee and which the circular of July 28, 2017 but which also gave a window for recruitment in exceptional circumstances and if approval had been obtained from the Chief of Staff and Head of the Public Service. The Court therefore finds that with due diligence, the respondents could have substantively recruited the CEO but they failed to invoke the clear windows of correct action. The Court also considers that the lapsing of the 6 months of acting CEO was such an exceptional circumstance that would entitle recruitment of a substantive CEO but which was not explored at all.
 - c. The petitioner has succeeded and the 2nd to 5th respondents to jointly or severally pay the petitioner's costs of the petition.
5. In conclusion judgment is hereby entered for the petitioner against the respondents for:
- a. The declaration that the 1st respondent herein has served the statutory maximum six months allowed in law as acting Chief Executive Officer in the secretariat of the Fund and is not eligible for further reappointment in an acting capacity.
 - b. The declaration that the 1st respondent should immediately cease acting as Chief Executive Officer to pave way for a transparent, open participatory recruitment of a new Chief Executive Officer in the secretariat of the Fund and a caretaker CEO to be appointed (for not less than 30 days and not more than 6 months) to oversee the transition.
 - c. The declaration that the respondents have failed in their administrative duties as regards competitive appointment of a new Chief Executive Officer in the secretariat of the Fund.



- d. The mandatory order is issued compelling the 2nd to 4th respondents to commence or conclude the process of recruiting and appointing the new Chief Executive Officer in the secretariat of the Fund competitively according to law.
- e. The 2nd to 5th respondents to jointly or severally pay the petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

